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No. 84-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

On Appeal From the United States District Court
For the Southern District of New York

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether Congress' delegation of nonreviewable judicial power to an arbitrator to adjudicate a data submitter's right to compensation for his research under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(1)(D)(ii), violates Article III of the Constitution.

2. Whether Congress' delegation of nonreviewable legislative power to a FIFRA arbitrator to establish standards for compensation awards violates Article I of the Constitution.

3. Assuming that FIFRA's compensation scheme is unconstitutional, whether the district court properly enjoined the use of a data submitter's research to register competitors' copycat pesticides with the U.S. Environmental Protection Agency, where FIFRA conditions the use of the submitter's data on payment of compensation.

THE PARTIES

Pursuant to Supreme Court Rule 28.1, the parties and their publicly held parent companies and non-wholly-owned subsidiaries and affiliates are:

Abbott Laboratories

Ciba-Geigy Corporation
Ciba-Geigy Ltd. (Parent)

E.I. du Pont de Nemours & Co.

FMC Corporation
Ataka Construction & Engineering Co., Ltd.
CBV-Industria Mecanica, S.A.

Rhone-Poulenc, Inc.
Rhone-Poulenc S.A. (Parent)

Rohm and Haas Company
The Shipley Company
Advanced Genetic Sciences

Stauffer Chemical Company

Union Carbide Agricultural Products Company, Inc.
Union Carbide Corporation (Parent)
Union Carbide Australia and New Zealand Limited
Union Carbide Canada Limited
Union Carbide Mexicana, S.A. de C.V.

Uniroyal, Inc.
UNIROYAL Industri Turk A.S.
Uniroyal LIMITED (U.K.)

Velsicol Chemical Corporation
Northwest Industries, Inc. (Parent)

Zoecon Corporation
Sandoz Ltd. (Parent)

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Appellees.

On Appeal From the United States District Court
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MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16, appellees move that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

This appeal is an attempt by the government to escape the Supreme Court's unequivocal prohibition against encroachment upon the authority of the judiciary. The Court's holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,' 458 U.S. 50 (1982), that the assignment of judicial power to Article I bankruptcy judges to adjudicate the liabilities of one private party to another is unconstitutional, plainly prohibits the far more egregious assignment which is at issue here—the assignment of judicial authority

to private arbitrators who are exempt from judicial review. By suggesting "there can be no doubt" that the arbitration scheme at issue here "*would be* constitutional as long as complete judicial review could be obtained in an Article III court," (J.S. at 15)[1] (emphasis added), the government concedes doubt concerning the unconstitutionality of the statute. The suggestion that this constitutional issue can be resolved in a summary reversal (J.S. at 17) is preposterous, and manifests the government's attempt to undermine the effect of the Court's decision in *Northern Pipeline*.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, requires that an offer of compensation be made to the submitter of original pesticide research data when the U.S. Environmental Protection Agency (EPA) uses the submitter's research to register a copycat ("me-too") pesticide product. FIFRA § 3(c)(1)(D)(ii). Absent an agreement with the me-too applicant, the submitter can obtain compensation only by requesting the Federal Mediation and Conciliation Service (FMCS) to appoint an arbitrator. FIFRA gives the arbitrator "final and conclusive" authority to adjudicate the submitter's compensation and commands that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination," except for fraud or misrepresentation.

The principal issues presented by this case are whether FIFRA's delegation of nonreviewable judicial power to arbitrators to determine a data submitter's right to compensation violates Article III of the Constitution; and if it does violate Article III, leaving the submitter with no constitutional forum in which to obtain compensation, whether it was proper for the district court to enjoin the uncompensated use of the submitter's data to grant registration to me too applicants.

[1] References to EPA's Jurisdictional Statement and to the appendix thereto are cited as "J.S." and "J.S. App.," respectively.

The district court twice concluded that there is "no question" that FIFRA's arbitration scheme violates Article III "on its very face," under the authority of this Court's ruling in *Northern Pipeline*. (J.S. App. 4a, 20a and 21a). Furthermore, after this Court remanded EPA's original appeal to the district court for consideration in light of its decision last term in *Ruckelshaus v. Monsanto Co.*,[2] 104 S. Ct. 2862 (1984), the district court also reaffirmed its original conclusion that this case is ripe because, *inter alia*, appellee Stauffer Chemical Company had undergone an arbitration and was aggrieved by EPA's use of its data, by the compulsion to resort to the unconstitutional arbitration scheme to obtain compensation, and by the inadequacy of the compensation award itself. (J.S. App. 3a-4a).

Because FIFRA's violation of Article III is clear on the face of the statute, the question raised by EPA's appeal is insubstantial. The judgment of the district court should not be disturbed.

1. To register a pesticide, an applicant must present the results of extensive research and testing to demonstrate the safety of the pesticide to man and the environment. FIFRA §§ 3(c)(1)(D) and 3(c)(2)(A). This research must include a comprehensive array of tests to determine the pesticide's toxicological properties and effects on the environment. 40 C.F.R. § 162.8 (1983), and 40 C.F.R. Part 158, printed in 49 Fed. Reg. 42,856 (1984) (test data requirements for registration).

Appellees are inventors and producers of pesticide chemicals. They support vast research programs to develop new products and establish their safety and efficacy.

[2] This case presents issues that were not decided by the Court in *Monsanto*. *See infra* at 8-9.

The research to develop a pesticide often costs tens of millions of dollars,[3] may take 14 to 22 years, and typically requires the screening and testing of 20,000 chemicals for each successful product. *Monsanto*, 104 S. Ct. at 2871. Many of the research data produced as a result of these efforts are trade secrets under state law, *id.*, and give rise to property interests protected by the Constitution. *Id.* at 2874.

EPA's premarket testing requirements impose substantial burdens on product innovators, like appellees. Not only must the innovator alone bear the cost and risk of the research, but his new products must be withheld from the market for several years while they are being tested in accordance with EPA requirements and undergoing EPA review. FIFRA thus imposes a delay cost on the innovator because of the postponement of income that would be generated from marketing the product.[4] Each year of regulatory delay can cost the developer millions of dollars and shorten the term of any available patent protection.

In order to minimize duplicative testing, FIFRA allows imitators (me-too applicants) to satisfy EPA's testing requirements by relying on research performed by the product innovator. FIFRA § 3(c)(1)(D)(ii).[5] Under this man-

[3] The National Agricultural Chemicals Association reported that manufacturers spent $580 million for pesticide R&D in 1983. 1983 Industry Profile Survey of the National Agricultural Chemicals Association, p. 7.

[4] Office of Technology Assessment, U.S. Congress, Technological Innovation and Health, Safety and Environmental Regulation, at VIII-47 (1981); The Conservation Foundation, Product Regulation and Chemical Innovation, at IV-33 (1980).

[5] A limited exception to the mandatory licensing requirement is contained in FIFRA § 3(c)(1)(D)(i) (J.S. App. 27a-28a). This section specifies that data submitted in support of certain new products registered after September 30, 1978 may not be relied on by other applicants for a period of ten years. The validity of this provision is not at issue in this appeal.

datory licensing provision, the me-too applicant gains immediate entry to the market, without risk or delay or testing costs, thereby avoiding entirely the burdens of government regulation borne by the innovator alone. Because of this inequity, and to provide incentives for innovative R&D, FIFRA provides that the original data submitter's research may be used to support the me-too applicant's registration "*only if* the applicant has made an offer to compensate the original data submitter." § 3(c)(1)(D)(ii) (J.S. App. 20a) (emphasis added).

Prior to 1978, FIFRA provided that if the parties did not agree, the amount of compensation would be determined by EPA, with a right to appeal to the federal district courts. (J.S. App. 8a); *Monsanto*, 104 S. Ct. at 2868. But as amended in 1978, FIFRA removed EPA from the compensation procedure and required the data owner to initiate "binding arbitration" under the auspices of FMCS.[6] FMCS is empowered "to appoint an arbitrator" from its roster of arbitrators (J.S. App. 29a). The findings and determination of the arbitrator are "final and conclusive." FIFRA further declares that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . . ." § 3(c)(1)(D)(ii) (J.S. App. 29a-30a).

[6] FMCS "is in the business of helping to resolve labor disputes between employers and representative[s] of their employees." It "rarely arranges or conducts arbitration of commercial disputes" and its private labor arbitrators "do not handle commercial disputes arising under FIFRA." 45 Fed. Reg. 55,395 (1980). For this reason, FMCS appoints arbitrators to FIFRA cases from the roster of the American Arbitration Association ("AAA"). 29 C.F.R. § 1440.1 (1984).

The statute provides no standard for the arbitrator to follow in determining compensation.[7] FIFRA thus vests in each arbitrator, in each case, the authority to formulate criteria governing compensation, as well as the unreviewable power to determine the amount of compensation awarded.

2. During the pendency of the district court action, EPA used appellees' research data to grant me-too registrations to competitors for several important products. Some of these data contained confidential analytical techniques (for example, methods for quantifying radiolabeled pesticide metabolites) which met the standards for trade secrets under the laws of the states where appellees reside.[8]

As an example, EPA used appellee Stauffer Chemical Company's research data concerning the pesticides butylate and EPTC to issue me-too registrations to PPG Industries, a large manufacturer, as well as to others. (J.S. App. 2a). These herbicides alone account for sales of hundreds of millions of dollars in the United States.

Because no agreement could be reached, Stauffer had no choice but to initiate an arbitration against PPG Industries

[7] FMCS declined to publish a standard for compensation on the ground that neither FIFRA nor the legislative history "specified a formula or other guidance on the valuation of data for compensation purposes." 45 Fed. Reg. 55,394 (1980); 45 Fed. Reg. 28,105, 28,107 (1980). The district court agreed that "this is a standardless delegation of powers." (J.S. App. 19a.) *See also* the opinion of the district court in *Monsanto Co. v. Acting Administrator, EPA*, 564 F. Supp. 552, 567 (E.D. Mo. 1983). Indeed, former EPA Administrator Douglas M. Costle requested Congress to establish guidelines for determining compensation, H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974, but Congress did not do so.

[8] The trade secrets are described in the Memorandum of Plaintiffs in Support of Motion for Summary Judgment at 23-25, 50, and accompanying affidavits. *Union Carbide Agricultural Products Co., Inc. v. Ruckelshaus*, No 76 Civ. 2913 (filed Aug. 24, 1981).

in April 1982 for compensation for PPG Industries' use of Stauffer's butylate research. (J.S. App. 2a). *In re Stauffer Chemical Co. v. PPG Industries*, No. 16 199 077 82 FIFRA (Am. Arb. Ass'n June 28, 1983). Over Stauffer's objection, FMCS appointed three arbitrators to the case who had been subjected to training on the factors that EPA (which Congress had removed from any official role in determining compensation) thought should control the arbitrators' decision[9]—factors with which Stauffer strongly disagreed. The arbitration decision rendered in June 1983 left Stauffer aggrieved by awarding it a small fraction of the amount of compensation claimed (J.S. App. 3a)—approximately $50 million less than the amount to which Stauffer claimed entitlement. FIFRA barred appeal by Stauffer of the award.

3. Because appellees were threatened with the continued use of their data to support competitors' registrations (J.S. App. 4a), they requested the district court to enjoin the operation of FIFRA's "use of data" provision insofar as it permitted competitors to rely on an originator's data without providing a constitutionally valid mechanism for obtaining the compensation that the statute requires. Appellees claimed that the compensation scheme was infirm under Article I as well as Article III.[10]

[9] Memorandum of Law in Support of EPA's Motion to Dismiss or for Summary Judgment at 86, *Union Carbide Agricultural Products Co. v. Ruckelshaus*, No 76 Civ. 2913 (dated Oct. 26, 1981).

[10] In the court below, appellees previously had challenged the use of data provision of § 3(c)(1)(D), as well as the data disclosure provision of § 10 of FIFRA, as a taking of property without just compensation, raising the same issue that ultimately was decided by the Court in *Ruckelshaus v. Monsanto Co.* After the Chourt of Appeals for the Second Circuit reversed an order granting a preliminary injunction, *Union Carbide Agricultural Products Co. v. Costle*, 632 F.2d 1014 (2d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), appellees dismissed their Fifth Amendment claim in the district court, reserving the right to refile a taking claim in the U.S. Claims Court. Appellees amended their complaint and filed a motion for summary judgment raising the Article I and Article III claims presented here.

Under the authority of this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the district court held, on cross-motions for summary judgment,[11] that FIFRA's delegation of unreviewable judicial authority to arbitrators violates Article III. (J.S. App. 20a.)

On appellees' claim of an unconstitutional delegation of legislative power to the arbitrators, the district court concluded that appellees "appear correct . . . that this is a standardless delegation of powers" that is "utterly without judicial review," but did not rest its decision on that ground alone. (*Id.* at 19a.)

In holding that FIFRA's arbitration scheme violates Article III, the district court recognized that Congress, in accordance with *Northern Pipeline*, possesses substantial discretion to create substantive federal rights and to tailor the manner in which they may be adjudicated. This includes the authority to assign to an adjunct some functions historically performed by judges—provided that the functions of the adjunct are limited in such a way that the essential attributes of judicial power are retained in an Article III court. (J.S. App. 19a-20a.) The district court concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation." (*Id.*) It found that the arbitration scheme deprives the courts of any role in fact-finding and bars them from considering matters of law arising from the substantive issues in the compensation dispute. "This leaves the courts with no power to make any 'informed, final determination' of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III." (*Id.*)

[11] No fact material to the constitutionality of § 3(c)(1)(D) has been disputed by any party.

The district court rendered a judgment declaring FIFRA's provisions for determination of compensation unconstitutional as a violation of Article III, and enjoined the use of a submitter's data where compensation is to be determined under § 3(c)(1)(D). (J.S. App. 25a-26a.)[12]

The district court also rejected EPA's contention that the case was not ripe. Because FIFRA compelled appellees to seek compensation for the use of their data through the arbitration scheme, the court concluded that the constitutionality of that scheme was clearly ripe for resolution. (J.S. App. 16a n.2).

4. EPA appealed directly to this Court (No. 83-1564). During the appeal, the Court ruled on the taking question raised in *Ruckelshaus v. Monsanto Co.* As part of its taking claim, Monsanto alleged that just compensation was not available for any taking effected by FIFRA because of the Article III defect in the compensation scheme. The Court did not decide the merits of the Article III issue in *Monsanto*. Rather, it held that Monsanto's challenges to the constitutionality of the compensation scheme were not ripe for resolution because "the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA." 104 S. Ct. at 2882. The Court further stated that "[o]nly after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." *Id.*

[12] In a second count of their complaint, appellees also challenged FIFRA's grant of authority to EPA to disclose trade secret information on the ground that it effects a retroactive deprivation of property rights without due process of law. The district court found that the statute's withdrawal of trade secret protection did not violate due process requirements regardless of whether it upset settled expectations. (J.S. App. 14a.) That issue is not before the Court in this case.

In the *Union Carbide* appeal, the Court subsequently vacated the judgment and remanded without opinion for further consideration in light of *Ruckelshaus v. Monsanto. Ruckelshaus v. Union Carbide Agricultural Products Co.*, 104 S. Ct. 3566 (1984) (mem.). The Court expressed no view as to the merits of the district court's ruling.

On remand, appellees moved, with supporting affidavits, that the original judgment be reentered on the ground that the case was clearly ripe in view of Stauffer's arbitration award. Following a hearing at which EPA stipulated that it did not contest Stauffer's factual allegations concerning the arbitration, the district court reentered its original judgment. (J.S. App. 1a, 21a). It found that Stauffer was aggrieved by EPA's use of its data under FIFRA and by the statute's compulsion that Stauffer resort to an unconstitutional arbitration procedure to obtain compensation for the use of its data. Furthermore, Stauffer alleged, EPA did not contest, and the district court found, that Stauffer also was aggrieved by the tremendous shortfall in the amount of compensation awarded.[13] (J.S. App. 3a-4a). Based on these facts the court concluded that Stauffer's claims were ripe for resolution under the *Monsanto* criteria. (J.S. App.

[13] Although Stauffer clearly was aggrieved by the arbitration procedure and resulting award, and the district court so found, Staufer was precluded by § 3(c)(1)(D)(ii) from seeking judicial review of the award. Despite the fact that PPG Industries voluntarily agreed to use Stauffer's data and participate in the arbitration, it has asked another district court to overturn the award, on the ground the § 3(c)(1)(D)(ii) is unconstitutional, and that the arbitrators allegedly are guilty of misconduct. *PPG Industries, Inc. v. Stauffer Chemical Co.*, Civ. No 83-1941 (D.D.C. filed July 7, 1983). Stauffer's position is that because the arbitration scheme is unconstitutional, PPG Industries' registrations should be cancelled. In addition, Stauffer contends that PPG Industries should pay damages for the use of Stauffer's data for the period that the registrations were in effect. Moreover, if the arbitration scheme is upheld, Stauffer is entitled to enforcement of the award, the only option possible under FIFRA absent facts indicating fraud or misconduct.

4a).[14] Finding that "there is no basis for changing the views earlier expressed" that § 3(c)(1)(D) violates Article III, the court reentered the judgment. (*Id.*)

EPA again appealed to this Court and obtained a stay of the judgment.

THE QUESTION PRESENTED WAS CORRECTLY RESOLVED BY THE DISTRICT COURT

In enacting the arbitrator compensation scheme of FIFRA, Congress unconstitutionally delegated plenary legislative and judicial power to arbitrators. The Executive Branch controls the selection of arbitrators for each case, and has the power to appoint only arbitrators who submit to its indoctrination. The arbitrators are vested with absolute power to establish legislative standards for compensation, and to adjudicate the data owner's compensation rights without review by Article III courts. FIFRA thus violates the doctrine of separation of powers that is at the core of the Constitution's grant of Article I and Article III authority. Under the principles enunciated in *Northern Pipeline*, FIFRA's constitutional infirmity is obvious.

Appellees have been harmed by this scheme. Congress required that they be paid compensation as a condition for the use of their research data to register competitors' products pursuant to § 3(c)(1)(D). Appellees' data have been used, but appellees have no constitutional forum available in which they can obtain compensation.

The district court thus properly granted a judgment enjoining any use of data that is conditioned upon the unconstitutional compensation determination. Furthermore, because Congress clearly expressed its desire to keep

[14] The court also concluded that all of the appellees faced a "clear threat" of the use of their data by EPA pursuant to § 3(c)(1)(D) to grant me-too registrations, and are aggrieved by FIFRA's compulsion to resort to the unconstitutional arbitration scheme to obtain compensation.

arbitration disputes out of the federal courts, this Court should not take it upon itself to legislate a judicial review system for arbitrations in contravention of Congress' intent. The statute should be sent back to Congress to design a compensation scheme that conforms with the requirements of Article I and Article III.

The judgment of the district court should be affirmed.

I. THIS CASE IS RIPE

The district court concluded, both in its original opinion and on remand, that appellees' claims are ripe. (J.S. App. 16a n.2. and 4a.) EPA's argument to the contrary is based on a mischaracterization of the complaint, and on a misrepresentation of facts that EPA did not contest in the court below.

This case is *not*—as EPA would have the Court believe—a hypothetical challenge to FIFRA's arbitration scheme. (J.S. 10, 12.) Rather, the thrust of appellees' challenge is to FIFRA's "use of data" provision. Appellees' contention is that use of their data should not be permitted because Congress conditioned such use on payment of compensation, and compensation is not available because of the constitutional defects in the arbitration scheme.[15] The injury that appellees already have experienced, and that threatens to occur again,[16] is *the use of their data* by competitors. (J.S. App. 2a, 4a.) The district court found that appellees, and in particular appellee Stauffer, are aggrieved by the use of their data without a constitutional forum in which to obtain

[15] As the district court stated, "plaintiffs object to the requirement . . . that allows competitors to use such data in support of their own pesticide registrations. . . ." (J.S. App. 5a.) "Plaintiffs contend that the compensated use requirement, coupled with the particular arbitration remedy provided in the statute, is improper. . . ." (J.S. App. 11a.)

[16] This threat is very real. EPA used appellees' data pursuant to § 3(c)(1)(D) before it was enjoined by the district court, and concedes that it will do so again if permitted to implement the statute.

the mandated compensation. (J.S. App. 3a, 4a.) The relief that they requested, and that the district court granted, was to restrain EPA from using any of appellees' data that are subject to a determination of compensation under the defective arbitration scheme. This case therefore is ripe because appellees have suffered actual injury, are threatened with further injury, and the injury is linked directly to the constitutional infirmity in the arbitration scheme. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978). (J.S. App. 15a n.2.)

Furthermore, the issues are clearly fit for judicial decision. The questions presented are purely legal. EPA has not alleged that any material fact is in dispute. Nor, quite tellingly, has EPA demonstrated that any fact concerning a particular arbitration could in any way be relevant to the issues presented here. Nothing that occurs in an arbitration would make the issues presented for decision in this appeal any more concrete than they are now. The district court so found. (J.S. App. 16a, n.2.)

In addition, withholding review would cause obvious hardship to appellees. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967). They would continue to suffer injury from the use of their data by competitors without being able to obtain the compensation that the statute requires. The injury to appellees here is the same as that suffered by Marathon in *Northern Pipeline*—deprivation of the right to an Article III forum—and this case is no less ripe.[17] Clearly, the facts underlying the breach of contract dispute in *Northern Pipeline* were not even discussed in the opinion and had no more bearing on the Article III issues than do the facts of a specific arbitration here.

[17] Appellees have a "personal right . . . to demand Article III *adjudication" of their compensation claims, Pacemaker Diagnostic Clinic of America v. Instromedix, Inc.* 725 F.2d 537, 541 (9th Cir. 1984) (*en banc*), and that right is infringed by the nonreviewable arbitration scheme.

Appellees need not await the consummation of further threatened injury to obtain preventive relief. *Pacific Gas & Electric Co. v. State Energy and Resources Conservation and Development Commission*, 461 U.S. 190, 103 S. Ct. 1713, 1721 (1983). "[T]he impact of the [arbitrator compensation provision] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories v. Gardner*, 387 U.S. at 152; *see also United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1955). Appellees are entitled to a "reasonable, certain and adequate provision for obtaining compensation" before their property rights in the data they have submitted to EPA are further disturbed. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974).

This case further is ripe under the criteria enunciated in *Monsanto*. EPA concedes that appellee Stauffer's data were used to support me-too registrations and that an arbitration award has been rendered. (J.S. App. 1a, 2a.) Under *Monsanto*, that is all that is required. 104 S. Ct. at 2882.

EPA misrepresents that Stauffer was not injured by the arbitration award, *when in fact EPA did not contest in the district court below that Stauffer was aggrieved by the shortfall in the amount awarded.* Stauffer alleged that it was aggrieved by the insufficiency of the award, EPA did not dispute the allegation, and the district court made such a finding. (J.S. App. 1a, 3a.) EPA cannot now in good faith assert to this Court that "Stauffer has no quarrel with the substance of the arbitration award." (J.S. 12.) That assertion is simply false.

The critical element of EPA's ripeness argument is its assertion that Stauffer has failed to seek review of the arbitrator's award. This makes no sense. EPA simplistically reasons that Stauffer must be happy with the award because it has not sought judicial review and thus has not "employ[ed] the full statutory procedure for obtaining

compensation." (J.S. 12.) Indeed, the "full statutory procedure" expressly bars judicial review of the award. That bar to Article III adjudication is the crux of Stauffer's injury.

Stauffer is not required to pursue or create a remedy which does not exist in order to establish the ripeness of an action challenging the absence of that very remedy. Stauffer has done everything permitted by FIFRA to obtain the compensation to which it is entitled. It has challenged the FIFRA procedure precisely because it does not permit Stauffer to obtain the kind of Article III adjudication that EPA advocates.[18] For that reason, the action is ripe.

II. FIFRA'S ARBITRATOR COMPENSATION SCHEME IS UNCONSTITUTIONAL

A. The Delegation Of Nonreviewable Judicial Power To Arbitrators Violates Article III

Article III, Section 1, of the Constitution commands that the judicial power of the United States be exercised by judges who have the protections prescribed by that article: life tenure and nondiminishable compensation.

FIFRA violates this constitutional mandate by assigning the judicial power of the United States to private arbitrators in a manner even more egregious than the delegation to Article I courts that was held unconstitutional in *Northern Pipeline*. The selection and compensation of the arbitrators under FIFRA are subject to the Executive's control. The arbitrator has plenary power to adjudicate individuals' compensation rights and liabilities under state and federal law. The arbitrator is not merely a fact-finding adjunct to a federal judge; instead, he has been vested by Congress

[18] Furthermore, Stauffer has responded to PPG Industries' challenge to the arbitration award in a manner that is fully consistent with its position here. *See supra* note 13.

with the "final and conclusive" authority to decide all questions of law and fact. The scheme does not retain the "essential attributes of judicial power" in Article III courts, as required by *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982). To the contrary, it specifies that "no official or court of the United States shall have power or jurisdiction to review any such findings and determination." § 3(c)(1)(D)(ii). The FIFRA scheme thus violates the principles of separation of powers and judicial impartiality that lie at the heart of Article III.

In *Northern Pipeline*, the Court held that Congress' assignment of judicial power to non-Article III bankruptcy judges, under the Bankruptcy Act of 1978, to adjudicate Marathon's liability to Northern, violates Article III. *Id.* at 87, 91. A majority of the Court agreed that Marathon had the right to insist that Northern's claims, which arose under state law, be adjudicated by an Article III tribunal. *Id.* at 91 (Rehnquist, J., concurring). In the view of the plurality, Article III prohibits Congress from vesting jurisdiction in Article I legislative courts to decide matters of "private rights"—specifically, "the liability of one individual to another under the law as defined." *Id.* at 69-70. With respect to the adjudication of rights arising under federal law, Congress may create Article I tribunals to act as fact-finding adjuncts to constitutional courts, but the "essential attributes of judicial power" must be reserved in the Article III courts themselves. *Id.* at 81.

The district court here concluded that "[t]here can be no question that on its very face § 3(c)(1)(D) fails to abide by this limitation" (J.S. App. 20a):

> The use-compensation system utterly deprives the federal courts of any meaningful role in ensuring the provision of fair compensation to data submitters. The courts play no role in fact-finding. More importantly, however, they are barred from considering any matters of law arising from the substantive issues in dispute in an arbitration proceeding. Rather, their powers are limited to review for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator." This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III.[19]

(*Id.*)

As in *Northern Pipeline*, the rights at issue here are "private rights," because they involve "the liability of one individual to another under the law as defined." *Northern Pipeline*, 458 U.S. at 69-70. The arbitration adjudicates the submitter's right to compensation from the me-too applicant. The "public rights" doctrine does not apply here. That doctrine applies only to cases in which the government is a party, i.e. those which "arise between the government and parties subject to its authority." *Id.* at 67-68. In an arbitration under FIFRA, the government is not a party. The right to compensation is a private right because it involves the liability of a me-too registrant to a data submitter.

The private rights at issue in the FIFRA arbitrator compensation scheme arise under both state and federal law. Compensation involves the adjudication of trade secrecy rights that arise under state law. Portions of the research data in issue contain highly valuable trade secret techniques. *See Monsanto*, 104 S.Ct. at 2871. (Appellees described the trade secrets in their summary judgment affidavits, *see supra* note 7.) Compensation for data that contain trade secrets may well be greater than for other data, because by definition trade secrets provide their owner with the opportunity to obtain a commercial advantage over competitors. *Monsanto*, 104 S.Ct. at 2873. The

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[19] EPA concedes doubt about the constitutionality of the statute without full judicial review ("there can be no doubt that the scheme would be constitutional so long as complete judicial review can be obtained in an Article III court") (J.S. 15).

determination of whether the data contain trade secrets as defined by state law, and if so, the value of permitting a competitor to use them and destroy the right to exclude (*id.* at 2878), thus involves the adjudication of state law rights. Under *Northern Pipeline*, appellees have a right to an Article III adjudication of these state law claims.

With respect to the adjudication of purely federal statutory rights, a majority of the Court in *Northern Pipeline* also recognized that, at a minimum, review by Article III courts must be provided. The plurality in *Northern Pipeline* stated that although Congress has discretion to prescribe the manner in which federal statutory rights are adjudicated, and may assign fact-finding functions to an adjunct, the adjunct must be limited in such a way that the essential attributes of judicial power are retained in Article III courts. 458 U.S. at 80-81. Under FIFRA, it is the arbitrators, not the courts, who are vested with the essential attributes of judicial power.

In addition, the dissenting justices in *Northern Pipeline* agreed that "the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers. . . . Obviously, therefore, a scheme of Art. I courts that provides for appellate review by Art. III courts *should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.*" *Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting) (emphasis added). FIFRA, however, attempts to do precisely that: entirely preclude appellate review.

In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court ruled that the adjudication of federal statutory rights is subject to Article III requirements. "*Crowell* involved the adjudication of congressionally created rights" concerning compensation between employers and employees under a federal statute. *Northern Pipeline*, 458 U.S. at 78. The adjudication in *Crowell* was held to be "one of private right," subject to

Article III. 285 U.S. at 51. The Court found the adjunct scheme in *Crowell* consistent with Article III because "[t]he agency was thus left with the limited role of determining 'questions of fact.'" and "every compensation order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (citing *Crowell*, 285 U.S. at 44-45, 48). The Court upheld the compensation scheme "in view of these limitations upon the Compensation Commission's functions and powers." 458 U.S. at 78.

No comparable limitations apply to the FIFRA arbitration scheme. It is an adjudicatory device that is especially abhorrent to the values that Article III was intended to further: "a guarantee of judicial impartiality" and "the checks and balances of the constitutional structure." *Northern Pipeline*, 458 U.S. at 58. The delegation of judicial authority to private arbitrators under FIFRA thus is far more offensive than the delegation found unconstitutional in *Northern Pipeline*.

There is no colorable argument that an arbitrator appointed *ad hoc* under FIFRA could qualify as a fact-finding "adjunct" of the Courts. *See Northern Pipeline*, 458 U.S. at 77-87. FIFRA places *all* of the judicial functions exercised within the control of the executive. *Compare United States v. Raddatz*, 447 U.S. at 676-677, 681-683 (1980); *Northern Pipeline*, 458 U.S. at 79, 81.

An arbitrator appointed under FIFRA enjoys far less independence than a judge sitting on the Article I bankruptcy court declared unconstitutional in *Northern Pipeline*. A bankruptcy judge held office for a term of 14 years and was subject to removal only by the judicial council of the circuit in which he served. His basic qualifications for service could be determined by the Senate. His salary was set by statute. *See Northern Pipeline*, 458 U.S. at 53.

Furthermore, his decisions were guided by a well-established body of statutory law and judicial precedent, and were subject to review in an Article III court.

Under FIFRA, the arbitrator who adjudicates compensation is uniquely beholden to the Executive Branch. He is dependent upon the Executive agency, FMCS, for his appointment to every case. The Executive is free to set qualifications for service at his whim.[20] (FMCS has exercised this power of appointment by selecting only arbitrators who have submitted to "training" by an Executive agency, EPA, on the compensation factors it believes appropriate.)[21] The arbitrator's compensation is subject to the Executive's control.[22] No statutory standard limits the arbitrator's discretion, nor can any court set the decision aside, even if it is arbitrary, unsupported by the record, or contrary to law.

EPA's principal defense for this scheme is to argue that binding arbitration of statutorily created entitlements does not offend any requirement of procedural due process. (J.S. 13.) This proposition is faulty for two reasons. First, it ignores the fact that private rights, implicated by state law, are at issue in a FIFRA arbitration, *Monsanto*, 104 S. Ct. at 2873, and that the statutory rights at issue require adjudication in an Article III court. *Northern Pipeline*, 458 U.S. at 80-81. *See supra* at 17-18. EPA's argument, in an effort to restrict the application of *Northern Pipeline*, thus abandons the "private right-public right" distinction relied on by the Court in favor of a novel "common law right-

[20] § 3(c)(1)(D)(ii) gives FMCS the authority "to appoint an arbitrator from the roster of arbitrators maintained by such Service" for each dispute (J.S. App. 29A).

[21] *See* discussion *supra* at 7.

[22] FMCS delegated the initial authority to fix the arbitrator's compensation to the AAA and retained final decision-making authority. 29 C.F.R. § 1440.1; 29 C.F.R. pt. 1440 app. §§ 41, 42 (1984).

statutory right" distinction which the Court's precedents do not support. Second, the due process argument is irrelevant. Like the bankruptcy adjudication at issue in *Northern Pipeline*, FIFRA's arbitrator compensation scheme clearly contravenes Article III, whether or not it offends due process as well.

EPA cannot cite a single decision, by this Court or by any other, which has upheld an assignment of unreviewable judicial power to a non-Article III tribunal to adjudicate liability between individuals, without statutory standards and without an opportunity for substantive review in an Article III court.

B. FIFRA's Delegation Of Absolute Legislative Power To Arbitrators Violates Article I

Article I, Section 1, of the Constitution vests "all legislative powers" in the Congress of the United States. If the constitutional principle of separation of powers is to retain its vitality, FIFRA's delegation of absolute legislative power to arbitrators must be struck down. As the district court found, "this is a standardless delegation of powers" that is "utterly without judicial review." (J.S. App. 19a.)

FIFRA says nothing more than that the me-too applicant must "compensate" the data originator. § 3(c)(1)(D)(ii). Congress has abdicated its responsibility to set compensation standards to an ad hoc group of arbitrators. Unlike Congress, the arbitrators are not responsible to the electorate but to the Executive Branch, which appoints them individually to each dispute. Each arbitrator has unfettered discretion to apply arbitrarily any compensation standard he may fancy. Each arbitrator has the power to make the important policy choice on which Congress defaulted: how a product innovator who bears the brunt of government-mandated testing and regulation should be compensated when competitors use his research to market generic

imitations of his product. The choices before the arbitrator—whether to base compensation on the fair market value of the use of the data, on the impact of regulation on the innovator, on sharing of the cost of the research data, or on some other theory—implicate a wide range of socioeconomic values concerning incentives for innovation and competition policy.

The delegation under FIFRA is unprecedented. Appellees know of no instance in which Congress has sought *both* to impose a completely standardless delegation of legislative power *and* to bar the courts from any substantive review of the delegatee's exercise of the power. Unlike other cases in which broad delegations have been upheld, here no necessity has been shown either for the absence of an "intelligible principle" to guide the arbitrator's exercise of discretion or for the preclusion of court review "to test that exercise against ascertainable standards."[23] *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). *See also INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 2785 n.16 (1983). There are no precedents to guide the arbitrator because each arbitration is *sui generis*. *Compare Lichter v. United States*, 334 U.S. 742, 783 (1948). Because each arbitrator is appointed on a case-by-case basis, the delegatee has no residual authority or opportunity to develop continuity of policy. *Compare United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

FIFRA's delegation is an affront to the Constitution's separation of powers. If this delegation of legislative power can be sustained, the principle of separation of powers can have little meaning.

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[23] Former EPA Administrator Douglas Costle, during hearings on the 1978 FIFRA amendments, asked Congress to "make more explicit what factors it feels are pertinent in determining reasonable compensation." H.R. Rep. No. 343 (Part I), 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1966, 1974.

III. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER

A. The District Court Correctly Enjoined The Use Of Data Subject To The Invalid Arbitrator Compensation Scheme

Having found FIFRA's arbitrator compensation scheme unconstitutional, the district court enjoined EPA "from permitting or implementing any use of data where the submitter's compensation is to be determined under the said section 3(c)(1)(D)." (J.S. App. 25a-26a, para. 2.) The relief ordered by the district was proper because FIFRA conditions the use of data upon payment of compensation.

Section 3(c)(1)(D)(ii) authorizes EPA to rely upon an originator's data to grant a registration to a me-too applicant "*only if* the applicant has made an offer to compensate" (emphasis added). The statute provides a "right to compensation for the use of the data." *Id.* (J.S. App. 30a). Thus, FIFRA establishes an inextricable link between the use of data and compensation.

Congress' purpose in requiring compensation was to prevent "just plain stealing" the use of data. *Federal Environmental Pesticide Control Act: Review of FEPCA Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 11 (1973) (statement of Rep. Poage, Chairman, House Committee on Agriculture). Congress would not have permitted the use of data in the absence of a procedure for obtaining compensation. This was confirmed by Senator Patrick Leahy, a principal sponsor of the arbitration provision:

> [W]e are not allowing free use of ... data by competitors. If a registrant wishes to use the data generated by another company to support their registration then he must pay compensation for the data. ...

123 Cong. Rec. 25,706 (1977). Congress viewed compensation as the *quid pro quo* for authorizing the use of data. Accordingly, the use-compensation system was enacted as "a single statutory grant of jurisdiction" which cannot be severed. *See Northern Pipeline*, 458 U.S. at 87 n.40.

Permitting the use of data in the absence of a procedure for obtaining compensation would have provided me-too applicants the "free ride" that Congress intended to prevent. *See* S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4023, 4091-92. The district court's injunction against the use of data thus effectuated rather than contravened congressional intent. *Sathon, Inc. v. American Arbitration Association*, No. 83 C 6019, slip op. at 6, 9 n.6 (N.D. Ill. Mar. 30, 1984) (me-too applicant estopped from challenging duty to pay compensation as determined through arbitration after using another company's data to obtain me-too registration). Enjoining the use of data, therefore, was the only proper relief the district court could have granted to effectuate the congressional purpose.

B. The Arbitration Scheme Cannot Be Saved By Severing The No-Review Clause

EPA's simplistic proposal is to "save" the arbitration scheme by striking FIFRA's no-review clause. (J.S. at 15-16.) But to create a right of judicial review where Congress expressly prohibited it would move the Court into the role of legislator. Because Congress plainly declared its intent to prohibit judicial review, and to keep compensation disputes out of the federal courts, the responsibility to remedy the arbitration scheme lies with Congress, not the judiciary. Furthermore, severance of the no-review provision would not cure the statute. Merely to strike the clause would create a vacuum rather than a right of review. The decisions of this Court hold that 28 U.S.C. § 1331 does not, in and of itself, create a right of appellate review in

Article III courts. In order to create such a right, the Court would have to overstep its judicial role and engage in lawmaking to construct an arbitration scheme that conforms to the requirements of Article I and Article III.

Whether the no-review clause can be severed from the arbitrator compensation provision is in the first instance a question of congressional intent. *Lynch v. United States*, 292 U.S. 571, 586 (1934). Here, FIFRA clearly commands that no review be permitted and forecloses any debate about Congress' intent. A statute which expressly prohibits judicial review may not be rewritten by the courts in order to cure a constitutional defect. *Swain v. Pressley*, 430 U.S. 372, 376-78 (1977). FIFRA's preclusion of judicial review is "sufficiently plain to require [the Court] simply to read it as it is written." *Id.; see also Lewis v. United States*, 445 U.S. 55, 65 (1980). "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981); *United States v. Sullivan*, 332 U.S. 689, 693 (1948).

Despite the plain language of the statute itself, EPA contends that "there is nothing in the legislative history to suggest that Congress would have failed to enact the [arbitration] provision without such a limitation [on judicial review]." (J.S. 16.) To the contrary, the legislative history merely confirms that one of Congress' purposes in restructuring § 3(c)(1)(D) in 1978 was to remove the determination of compensation from the realm of the judiciary. The no-review clause was an integral part of this congressional scheme.

Prior to 1978, FIFRA provided that compensation was to be determined by EPA with a right of appeal to the federal district courts. (J.S. App. 7a-8a); *Ruckelshaus v. Monsanto*, 104 S. Ct. at 2868. The 1978 FIFRA amendments removed the government from the compensation procedure, vested final and conclusive adjudicatory power in arbitrators, and

barred any appeal or judicial review. The purpose of this change was to implement Congress' belief that compensation "should be determined to the fullest extent practicable, within the private sector," and that the determination should "not require active governmental involvement." 123 Cong. Rec. 25,710 (1977) (statement of Sen. Leahy). Thus Congress' intent in restructuring § 3(c)(1)(D) in 1978 was to remove the adjudication of compensation claims from federal courts and agency officials.

The contrast between FIFRA and other arbitration schemes established by Congress confirms the legislative purpose to tailor the judicial review provision of each scheme to the nature of the dispute it was designed to resolve. Where judicial review was desired, it was provided for.[24] Where it was not desired, it was not provided for, or was narrowly limited.[25] In all instances where Congress did not provide for or narrowly limited judicial review, the arbitration was consensual or involved public rights, *i.e.*, rights against a government entity.

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[24] Congress provided for judicial review of arbitration awards arising from disputes under the Multi-Employee Pension Plan Amendments *Act of 1980* (*see* 29 U.S.C. § 1401(b)(2)); of arbitration awards arising from the removal or reduction in grade of federal employees under the Civil Service Reform Act of 1978 (*see* 5 U.S.C. § 7121(f)); of arbitration awards arising from grievances of licensees under the blind facility program under the Rehabilitation Act Amendments of 1974 (*see* 20 U.S.C. § 107d-2(a)); and of arbitration awards arising from claims asserted against the "Superfund" under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (*see* 42 U.S.C. § 9612).

[25] Congress made no provision for judicial review of arbitration awards arising from claims against the Overseas Private Investment Corporation under the Overseas Private Investment Corporation Amendments Act of 1981 (*see* 22 U.S.C. § 2197); of arbitration awards arising from design competitions in the procurement of aircraft designs by the armed forces (*see* 10 U.S.C. § 2271); or of arbitration awards arising from claims brought by subcontractors against prime contractors whose war contracts were terminated under the Contract Settlement Act of 1944 (*see* 41 U.S.C. § 113(f)).

The FIFRA arbitration scheme is unique. It is the only scheme devised by Congress which compels arbitration as the exclusive means for resolving disputes between private parties concerning private rights. And, it is the only scheme which expressly *prohibits* judicial review of private rights disputes. The prohibition of judicial review of FIFRA arbitrations was a deliberate act designed to keep the disputes out of the courts.

Thousands of FIFRA compensation offers are pending, each representing a potential arbitration. For this Court to second guess Congress and create a right of judicial review would risk clogging the courts with data compensation litigation, a result Congress clearly wanted to avoid. Had it been aware of the constitutional implications, Congress may well have devised an approach radically different from the arbitration scheme. Indeed, in 1982, the House of Representatives, joined by the Senate Committee on Agriculture, Nutrition and Forestry, approved legislation that would have abandoned the arbitration system altogether and replaced it with different forms of research incentives and protections for proprietary rights. *See* S. Rep. No. 551, 97th Cong., 2d Sess. 9 (1982).

The no-review clause thus is an inextricable part of the existing arbitration scheme. Striking the no-review clause would defeat the congressional purpose of reassigning the determination of compensation to private arbitrators and removing the courts from compensation litigation. Congress would not have intended that scheme to stay in force absent a no-review clause. As a result, the clause is not severable from the remainder of the arbitrator compensation system.[26]

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[26] FIFRA's "severability" provision, 7 U.S.C. § 136x (1982) is not a blanket authorization to fragment otherwise indivisible provisions of the Act. A severability provision does not take precedence over congressional intent to keep a statutory provision intact. "[T]he ultimate determination on severability will rarely turn on the presence or

(Continued on next page)

Furthermore, even if severance were permissible, it would not cure the statute. Merely to strike the no-review clause would not in itself create a right of judicial review; it would only produce a statutory void. EPA's assertion that a right to review of FIFRA arbitration decisions would arise under 28 U.S.C. § 1331 (J.S. at 15) is unsupportable. That statute does not create a right of action; it merely confers jurisdiction where such a right already exists. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951). Futhermore, *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963), cited by EPA, merely recognizes jurisdiction under § 1331 *to enforce* an award of an airline board of adjustment, *created by contract* under the Railway Labor Act, *whose decisions were final and binding upon the parties.* It recognized no right of review of the substance of the award. To the contrary, this Court has held that no right of judicial review of an arbitrator's decision arises under § 1331. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 301-306 (1943).

In addition, merely striking FIFRA's no-review clause would not begin to define the procedures or standards under which Article III review would be conducted. The Court would have to decide which Article III court should review the arbitration, would have to determine venue requirements, would have to decide what role the arbitra-

(Footnote 26 continued)
absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1967). FIFRA's severability provision states that the invalidity of one provision of the Act "shall not affect other provisions . . . *which can be given effect without regard to the invalid provision.*" FIFRA § 30 (emphasis added). That is not the case with § 3(c)(1)(D). Congress intended non-reviewable arbitration to be the exclusive means for resolving disputes concerning compensation for the use of data. Because Congress intended determination of compensation to be a private matter, the arbitration scheme enacted by Congress in 1978 cannot be given effect without the no-review clause.

tors should play as fact-finding adjuncts, and would have to establish a standard for appellate review.

In short, compliance with Article III would require a major overhaul of the arbitration scheme. Because the arbitrations adjudicate not only federal statutory rights, but also state law rights in trade secrets, "the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal. . . ." *Northern Pipeline*, 458 U.S. at 86 n. 39.

Further, striking the no-review clause would not supply the standards that are needed to guide the arbitrator's discretion, or a structure that would assure consistency and continuity. It would not cure the Article I violation.

Restructuring the arbitrator compensation scheme to resolve the Article I and Article III problems cannot be accomplished through statutory interpretation or through the deletion of language from the existing law. It is axiomatic that Congress, not the courts, has the power to legislate. But legislate is precisely what the Court would have to do to "save" this statute.[27]

[27] Other arbitration schemes devised by Congress demonstrate the complexity of establishing a right to judicial review. The degree of legislative discretion involved in this task makes it peculiarly inappropriate to create such a right by judicial action. The Civil Service Reform Act of 1978, for example, provides judicial review in the Court of Appeals for the Federal Circuit. 5 U.S.C. §§ 7121, 7703(b)(1). The Multi-Employer Pension Plan Amendments of 1980, 29 U.S.C. § 1401(b)(2), and the Comprehensive Environmental Response Cleanup and Liability Act of 1980, 42 U.S.C. § 9612(b)(4)(G), permit review in the district courts. The Rehabilitation Act Amendments of 1974, 20 U.S.C. § 107d-2(a), permit review under the standards delineated by the Administrative Procedure Act. The Multi-Employer Pension Plan Act establishes a presumption, rebuttable by a clear preponderance of the evidence, that the arbitrator's findings of fact are correct. 29 U.S.C. § 1401(c). The Civil Service Reform Act of 1978, on the other hand, requires the district court to set aside findings unsupported by substantial evidence. 5 U.S.C. § 7703(b)(1)(c)(3).

In light of the unconstitutionality of the arbitration scheme, it is likely that Congress will exercise its legislative discretion to amend the compensation system and effectuate the changes it initiated in 1982. Because the prohibition of judicial review is an integral part of the present scheme, and because legislative action is required to cure the constitutional deficiencies, that task cannot be accomplished by the courts. It is Congress' responsibility to restructure FIFRA "to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose." *Northern Pipeline*, 450 U.S. at 88 n.40.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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